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### Britvic/Barr

#### Citation for published version:

Andreangeli, A, Britvic/Barr: sparkling times... if it had not been for the regulator!, 2013, Web publication/site, Competition Law in Edinburgh Blog.

#### Link:

[Link to publication record in Edinburgh Research Explorer](#)

#### Document Version:

Publisher's PDF, also known as Version of record

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## Competition Law in Edinburgh

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### Britvic/Barr: sparkling times... if it had not been for the regulator!

Posted on [August 29, 2013](#) by [aandreangeli](#)

They say that time is of essence in business... and the proposed merger between Britvic (producer of famous beverages) and the very Scottish brand Barr, purveyor of Irn Bru seems to confirm how true this say is! It is also a cautionary tale for merger systems in general and also for the future Competition and Markets Authority, which is going to exercise both merger review and competition enforcement powers in the UK. the drinks' industry is not new to mergers: any Merger control student has studied the Nestle'/Perrier decision, adopted by the Commission. Carbonated soft beverages are big business in the United Kingdom: this industry turns out slightly over £14,500 million and its key players are The Coca Cola Company (TCCC) and, you would not guess?, Britvic and Barr. It was therefore not unexpected that a merger between two of the three main incumbents would attract the attention of the OFT—however, given the size of TCCC, one could have been forgiven for thinking that rivalry would not have been significantly affected, with the market leader well able to countervail any headway that the merged entity may have been able to make.

In the decision to refer (see: <http://www.ofc.gov.uk/news-and-updates/press/2013/14-13#.Uh8Xa3fO63Y>) the Office had expressed concerns that the acquisition of Britvic by Barr would have left, in substance, the latter in a position of relatively unconstrained leadership on the market for soft drinks: it was held that as a result of the concentration the competition constraints otherwise existing on Irn Bru and Orangina would have been significantly lessened.

The decision on the proposed merger was eventually handed down on 9 July 2013. The Competition Commission, however, was far less sanguine as to the ability of Barr to “hog” a significant part of the market in issue. The Commission accepted that the relevant market should be that for carbonated soft drinks and that the transaction would have given rise to a “relevant merger situation”; however, unlike the OFT, it took the view that the level of substitutability between Britvic and Barr’s drinks was limited in the eyes of consumers, thus minimising the risk of adversely affecting horizontal competition. The Commission also dismissed the allegation that the merger would lead to portfolio effects that would be detrimental to smaller beverage suppliers: it took the view that given the strength of the merged entities’ next competitor, i.e. TCCC, the merger would not have made any significant difference, both in terms of the ability of the merged firm to constrain the expansion of smaller rivals and of the likelihood of coordination with TCCC.

The decision was obviously welcome in industry quarters; speaking to STV (see: <http://news.stv.tv/west-central/228930-competition-commission-approves-merger-between-ag-barr-and-britvic/>) the Chairman of Britvic appeared rather pleased at the Commission’s findings. However, he was less committal as to the company’s immediate plans concerning the transaction: in his words, “Our company is in a different place to last summer when the terms of the merger were agreed. The cost savings from merging are less, we are performing better, we have new management and we have a new strategy (...). These are among the issues the board will reflect on in August once the Competition Commission’s conclusions are known in order to ensure that it acts in the best interests of Britvic’s shareholders (...).”

In light of these declarations, the news that Britvic and Barr would no longer go ahead with the proposed merger

was not very surprising. Already in mid July Britvic had let it be known that, in order to “resurrect” the merger a new offer, reflecting the improved condition of the company and its goodwill for the future, would have been required. Barr duly obliged: however, the revised deal “bit the dust” just a few weeks later, much to the regret of Barr’s officers. (See among other reports the informative piece published by the Belfast Telegraph just after the news broke out: <http://www.belfasttelegraph.co.uk/business/business-news/ag-barr-merger-with-britvic-firm-collapses-29413843.html>). Despite the offer being on more favourable terms, Britvic’s Chairman expressed full confidence in the new CEO and in the company’s plans to continue operating on its own; AG Barr, on its part, emerged from this long running story as relatively unscathed—this is especially clear if one looks at the value of its shares, which rose by 1% the day after the news that there would not be a merger after all was revealed.

Reading the reports one could be forgiven for thinking that the Britvic/AG Barr merger was just one of the many proposed deals that fail to see the day. Yet, this story clearly raises important questions of agency effectiveness and of institutional performance in the area of merger review: one of the uncontested “hallmarks” of a well-functioning merger control framework is the ability of the competent agencies to deliver decisions on individual proposed concentrations in accordance with principles of “speed” and “finality”: in other words, decisions should first of all be “good”, in the sense of being the outcome of accurate and well-informed legal and economic analysis; second, they should be delivered within a timescale that allows, so far as possible, the parties to act upon the decision in accordance with their commercial interests.

Unfortunately, if a week is a long time in politics, as the old adage goes, so is in the commercial and business world. The Britvic/AG Barr story provides a very tangible example of how quickly the position of an undertaking on the market, its shareholding value and, perhaps more importantly, its current and future plans can change and, consequently, affect any plans of consolidation. In this case, the fact that the Competition Commission got on to decide on the merger after a whopping 5 months from it being referred by the OFT meant that the approval, while being a reasonable outcome in light of the conditions of the market and the economic strength of the parties, remained largely ineffective. Against this background it may be legitimately asked whether this decision was a “good use” of the OFT and CC resources, as well as an appropriate response to the needs of the parties and to the demands of effective competition enforcement. In this specific context, it should be emphasised that the CC was invested of the case in the exercise of its exclusive powers of merger review and still managed to hand down a decision a significant time after the referral. It is therefore legitimate to ask whether once both antitrust enforcement and merger review are entrusted with a single authority (i.e. the CMA) we will see more concentration decisions like Britvic/AG Barr—“good decisions” but neither sufficiently “speedy” or “final” as to satisfy the demands of effective merger control.

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